SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1122

MARIAN VIRGINIA BUXTON, *In Propria Persona*,
Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI

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IN THE

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JURISDICTION

The Petitioner, in her Petition for a Writ of Certiorari, has not stated concisely the grounds upon which the jurisdiction of this Court is invoked. In essence she seems to state that her procedural and substantive rights of due process have been violated by the United States District Court, Southern District of New York, and the United States Court of Appeals, Second Circuit.

This Court does not have jurisdiction over this matter under 28 USC § 1254 (1948) or according to Rule 19 of the Revised Rules, Supreme Court of the United States (1970, as amended to 1972). There has been no decision in the Court of Appeals or the District Court upon which this Court's jurisdiction can be founded.

STATEMENT OF THE CASE

Mrs. Marian Virginia Buxton filed two substantially similar actions against the International Business Machines Corporation ("IBM") in the United States District Court

for the Southern District of New York. The actions were instituted on December 11, 1972 (72-CIV-5228) and January 2, 1973 (73-CIV-4). Defendant IBM moved to dismiss these actions under FRCP 12 (b) (6) on December 26, 1972, and February 5, 1973, respectively. Since the complaints had been drafted by the Petitioner, who was appearing pro se, and since it was difficult to discern her precise grounds for complaint and her theory of relief, Honorable Charles M. Metzner, U. S. D. J., on March 6, 1973, referred both motions, as well as motions for summary relief made by Petitioner, to Harold J. Raby, United States Magistrate.

In a report of April 12, 1973, Magistrate Raby recommended that 73-CIV-4 be dismissed by the Court because of the substantive matter contained in the Complaint, as well as because there was a prior action pending between the same parties and involving the same subject matter. This report is reprinted at page 1a of Appendix. The report was adopted on April 30, 1973, by Judge Metzner and this action was dismissed, with prejudice. This Memorandum & Order is reprinted at page 4a of Appendix.

In a second report on April 12, 1973, Magistrate Raby found that 72-CIV-5228 did state a cause of action for breach of a contractual obligation and for tortious withholding of stock. He recommended that IBM's motion to dismiss be denied, and also that Petitioner's motions for summary relief be similarly denied. This report is reprinted at page 5a of Appendix. The report was adopted by Judge Metzner and on April 30, 1973, he denied IBM's motion, without prejudice to IBM's right to move for summary judgment or other appropriate relief following its Answer to the Complaint. At the same time Judge Metzner denied Petitioner's motions for summary relief. (Order is at page 16a of Appendix.)

On May 11, 1973, Mrs. Buxton filed Notices of Appeals from the April 30, 1973, orders in both actions. On July 3, 1973, Mrs. Buxton filed with the Court of Appeals, Second Circuit, a "Notice of Consolidation of Appeals." This was denied on July 30, 1973.

On June 29, 1973, IBM moved to dimisss the appeal taken from the April 30 order in 72-CIV-5228. The basis of the dismissal was 28 USC §§ 1291 and 1292. Under 28 USC § 1291 the denial of a motion for summary judgment (as the court characterized Mrs. Buxton's motions for summary relief) is not a "final decision." On July 30, 1973, the Second Circuit granted IBM's motion and dismissed the appeal for lack of jurisdiction. The action was remanded for further proceedings. On November 16, 1973, the Second Circuit denied Mrs. Buxton's motion for a rehearing of its July 30 order.

Following the remand of 72-CIV-5228 to the District Court, IBM answered the Complaint and on June 4, 1973, IBM made a Motion for Summary Judgment. This Motion was granted by Judge Metzner on October 19, 1973. *An appeal has never been taken from this order.*

ARGUMENT

Mrs. Buxton in her Petition prays "that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 16, 1973, in the above entitled cause." As stated earlier, the November 16, 1973, order of the Second Circuit Court of Appeals denied Mrs. Buxton's motion for a rehearing of the July 30, 1973, order which dismissed the appeal in 72-CIV-5228 for lack of jurisdiction. When the case was remanded and summary judgment was entered against her, Mrs. Buxton never took an appeal. There

similarly has been no decision by the Court of Appeals on the District Court's dismissal of 73-CIV-4.

Rule 19 of the Supreme Court Rules sets out the considerations which govern the review on certiorari. The matter will be reviewed "only where there are special and important reasons therefor." Subparagraph 1(b) states, among other reasons, that a matter would be considered where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." This would seem to be what Petitioner is arguing. Yet it cannot be reasonably argued that Petitioner has been denied any of her rights in the courts below. The reports of Magistrate Raby indicate the extent to which the District Court accommodated Petitioner. The Second Circuit order of July 30, 1973, dismissing the appeal was clearly based on sound law, since it is clear that under 28 USC § 1291 the court had no jurisdiction to hear an appeal from an interlocutory order. There is no showing that the Court of Appeals at this time abused its discretion in denying the Motion to Consolidate the appeals. If the Petition is limited only to these orders of the Court of Appeals, as it must be, it must fail. The Petition cannot go *beyond* this and include a review of the merits of Petitioner's claim since Mrs. Buxton *has failed to appeal the District Court decision of October 19, 1973, which granted summary judgment in IBM's favor.* The Supreme will not consider the district court's dismissal of the action, where the petitioner had not raised the issue before the court of appeals. See *Adickes* v. *S. H. Kress & Co.,* 398 US 144 (1970). There are no exceptional circumstances which mandate such a review. See *Lawn* v. *United States,* 355 US 339 (1958).

CONCLUSION

There are no special or important reasons for this Court to grant the Petition for Certiorari and, therefore, an order should be entered denying certiorari.

Respectfully submitted,

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APPENDIX

Report of United States Magistrate

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4

MARIAN VIRGINIA BUXTON,

Plaintiff,

—v—

INTERNATIONAL BUSINESS MACHINES
and
FRANK T. CARY, President, et al., Officers of IBM,

Defendants.

REPORT OF UNITED STATES MAGISTRATE

TO THE HONORABLE CHARLES M. METZNER, U. S. D. J.

This report relates to a motion filed by defendants on February 5, 1973 to dismiss this action pursuant to Rule 12(b) (6) for failure to state a claim upon which relief can be granted. The motion was referred by you to the undersigned Magistrate for hearing and report by order dated March 6, 1973, a copy of said order being appended hereto as Exhibit A. That order also referred to me an identical motion concerning an action involving the same parties heretofore filed on December 12, 1972, which is the subject of a separate report of even date.

The complaint in this case, drawn *pro se*, is a one page document consisting of three paragraphs; the first paragraph describes the plaintiff as the widow of James Morgan Buxton; the second paragraph alleges that, as a result of "perjured statements" by one Marjorie Sommers plaintiff was forced into "a reluctant marriage with her deceased husband". Nowhere in this paragraph is any reference

made to the defendants or an explanation of who Mrs. Sommers is. The last paragraph alleges as follows: "IBM, the employer of [plaintiff's husband], has practiced ridicule, theft, forced residence changes, lack of health care, physical brutality, verbal expressions of sadism, lewdness and disparagement, brutal treatment and fraud on plaintiff. Plaintiff prays prosecution of damages."

The allegations in the third paragraph are so general and conclusive that they clearly do not constitute a cognizable claim against the defendants. For that reason alone, the defendants' motion to dismiss should be granted. I might add, however, that the granting of this motion is further justified by the fact that identical general allegations of misconduct are to be found in a previously filed complaint (as to which I have recommended, in a separate report, the denial of a motion to dismiss, my recommendation being based on the fact that the earlier complaint also contains what I believe to be non-demurrable matter). In short, this action should be dismissed, not only because of the substantive contained in the complaint, but also because there is a prior action pending between the same parties and involving the same subject matter.

It is accordingly recommended that the defendants' motion to dismiss the complaint be granted, that the complant be dismissed without leave to plead over, and that judgment be entered accordingly.

Copies of this report have been mailed this date to the plaintiff and to defendants' counsel with the direction that any objections thereto should be filed in your chambers not later than ten days from the date hereof.

The following papers, considered by me on this motion (and consisting, in fact, of all of the previously filed papers in this case) are forwarded to you herewith:

Report of United States Magistrate

1. Summons, filed January 2, 1973.
2. Complaint, filed January 2, 1973.
3. Motion to dismiss complaint, filed February 5, 1973.

Dated: New York, N. Y.
April 12, 1973.

Respectfully submitted,

HAROLD J. RABY
United States Magistrate

Memorandum and Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4

MARIAN VIRGINIA BUXTON,

Plaintiff,

—*v*—

INTERNATIONAL BUSINESS MACHINES
and
FRANK T. CARY, President, et al., Officers of IBM,

Defendants.

MEMORANDUM AND ORDER

METZNER, D. J.:

The defendants above named having, by notice of motion filed February 5, 1973, moved, pursuant to Rule 12(b) (6) to dismiss the complaint herein for failure to state a claim upon which relief can be granted, and said motion having been referred to HAROLD J. RABY, United States Magistrate, for hearing and report, and on reading and filing the report of said United States Magistrate dated April 12, 1973, and due deliberation having been had, it is

ORDERED, that defendants' motion be, and hereby is, granted in all respects, and it is

FURTHER ORDERED, that the complaint be, and hereby is, dismissed, without leave to plead over, and it is

FURTHER ORDERED, that judgment may be entered by the Clerk dismissing the complaint, with costs.

Dated: New York, N. Y.
April 30, 1973.

CHARLES M. METZNER
Charles M. Metzner
U. S. D. J.

Report of United States Magistrate

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5228

MARIAN VIRGINIA BUXTON,

Plaintiff,

—v—

INTERNATIONAL BUSINESS MACHINES

and

FRANK T. CARY, President, et al., Officers of IBM,

Defendants.

REPORT OF UNITED STATES MAGISTRATE

TO THE HONORABLE CHARLES M. METZNER, U. S. D. J.:

This report relates to a motion filed December 26, 1972 by defendants, IBM and its officers pursuant to Rule 12(b)(6) F. R. C. P. for an order dismissing the complaint for failure to state a claim upon which relief can be granted. This motion was referred by you to the undersigned Magistrate, for hearing and report, by your order dated March 6, 1973, a copy of which is appended hereto as Exhibit A. (The aforementioned order also refers to me for like purpose a separate and identical motion to dismiss a second complaint by the same plaintiff against the same defendants bearing Civil Docket 73 Civ. 4, which will be the subject of a separate report.)

Pursuant to your Honor's direction, and in an effort to obtain clarification of the plaintiff's alleged grievances against the defendants, I communicated by letter with the plaintiff, and also with defendants' counsel, directing them

to appear before me on April 9, 1973, in order that I might obtain a better understanding of the basis for the plaintiff's allegations. In addition to being so notified by letter, the plaintiff was, in addition, personally notified by my secretary of the forthcoming hearing on April 9th. Nevertheless, plaintiff not only failed to appear for the scheduled hearing, but failed to notify the undersigned concerning her possible inability to attend. Under those circumstances, I was constrained to hear the defendants' counsel's oral argument in support of the motion to dismiss and in opposition to what may be characterized loosely as the plaintiff's "cross-motions".*

The papers before me respecting this matter may be listed and described as follows:

1. Plaintiff's civil (Pro Se) complaint, filed December 12, 1972, in which it is alleged substantially as follows:

(a) That the defendants have frightened the plaintiff's husband to his death, concealed the whereabouts of his body, and left the plaintiff, his widow, stranded without income;

(b) That the defendants have stolen, and/or forged endorsements concerning IBM stock certifi-

*The following day, April 10, 1973 at 2 P.M., the plaintiff appeared at my office evidently being under the erroneous impression that the date was then April 9th. I explained to plaintiff that the purpose of the hearing was primarily for me to obtain a better understanding of the allegations in her complaint but that I was compelled to proceed in her absence on April 9th, not having received any explanation for her nonappearance at that time. Plaintiff then proceeded to explain orally to me the basis and objectives of her action. Having heard such explanation, I can say that nothing in her explanation is inconsistent with my prior understanding of the nature of the complaint, as will hereinafter be discussed.

cates jointly owned by plaintiff and her husband;

(c) That the defendants have placed a "body tape" on the plaintiff;

(d) That the defendants have engaged in a "campaign of terror on the body" of plaintiff's husband;

(e) That the defendants have conspired to alienate the affections of plaintiff and her husband from each other;

(f) That the defendants have wrongfully deprived plaintiff, as her husband's beneficiary, of compensation payments due to her under IBM's pension plan;

(g) That by reason of the foregoing she is entitled to $1,000,000 damages.

2. Defendants' notice of motion to dismiss complaint filed December 26, 1972.

3. Motion for emergency relief, etc. and response to notice of motion to dismiss complaint, filed by plaintiff on January 17, 1973, in which plaintiff claims that she was "defrauded of her entire life savings", etc. through the actions of IBM to "mercilessly pillage, defame, undermine, enslave and to use at hard labor through the relentless pursuit of this company to conspire to enslave plaintiff." She also alleges that a representative of IBM subjected her to "slaps, reckless driving, coercion, threats, intimidation and lewd suggestions", etc.; and attempted to have the plaintiff

placed in a state asylum while plaintiff was attending the University of California. She closes this document by asking this Court to declare her husband dead and for an order directing the return of property allegedly withheld from plaintiff by IBM. Thus, in effect the plaintiff is moving for the very relief demanded in the complaint, so that this motion may be characterized as a motion for summary judgment in favor of the plaintiff.

4. Motion for temporary relief filed by plaintiff January 23, 1973 in which she repeats her request contained in the January 17th paper for "emergency relief against enslavement", etc. and asks in effect for a mandatory injunction demanding the return of her alleged property. This motion is, in effect, merely a supplement to, or embellishment of, the plaintiff's "motion for emergency relief".

5. "Amended brief" in "support of plea for emergency relief", filed March 5, 1973. This brief merely contains head notes and legal citations dealing with such subjects as Statute of Frauds, Fraudulent Conveyances, Investment Securities, Liability in Damages, Libel and Defamation, Rules of the Supreme Court, Secured Transactions, Shareholders' Actions and Federal Tort Claims. The legal citations have no bearing whatsoever on the allegations contained in the so-called complaint.

6. Motion filed March 30, 1973 by plaintiff to "add 5 xerox pages of exhibits" and "to state that twice she had secured vitriolic statements as to kill persons, e.g. Mr. Buxton, deceased husband of plaintiff, and a similar perjured statement on the part of Mrs. Marjorie

> Sommers in a court of law." In this paper, plaintiff claims that she was coerced and intimidated into marriage by harassment and threats, that she cannot stand the climate of Washington, D. C., and "begs relief from the court to order the return of the title to her apartment #108 at 2957 Kalahaua Avenue, Honolulu, Hawaii, while prosecuting a labor age discrimination suit on the west coast in hopes of obtaining work."

It is obvious, from an examination of the complaint in this case, that it is replete with redundant and irrelevant matter, much of which is wholly unrelated to the defendants, and some of which relates purely to alleged wrongs committed by the defendants against persons other than the defendant, notably the plaintiff's husband. Some of the content indeed borders on the irrational.

It is certainly not an easy complaint for defendants to answer, since each paragraph (none of which is even numbered) deals with a multitude of unrelated subjects, with the inevitable result that the defendants would be obliged either to deny the allegations of the complaint in its entirety, or to select or quote particular passages of the complaint which are admitted and deny the remainder of the allegations (or perhaps deny information sufficient to form a belief with respect thereto).

However, the defendants' motion does not address itself to any assumed difficulty in answering the allegations of the complaint. The motion is not made under Rule 12(e) F. R. C. P. for a more definite statement, but is rather made under Rule 12(b) (6) for dismissal on the ground that the complaint fails to state a claim upon which relief can be granted. Any such motion, which of course is in the nature of a general demurrer necessarily assumes (for the

purpose of the motion) the truth of any and all allegations in the complaint. This being so, it follows that even if some of the allegations in the complaint (assumed to be true for purposes of the motion) fail to state a claim on which relief can be granted, the complaint will nevertheless withstand a demurrer if it contains other allegations of fact which if true (no matter how factually improbable they may be) will entitle plaintiff to relief. It is in that context that the defendants' motion must be judged, for I reject any assumption by defendants that the complaint, read as a whole, is irrational.

Thus, I would have no hesitancy, for example, in recommending the dismissal of this complaint, if its allegations were limited to the charge that the defendants had committed wrongs against the plaintiff's husband, since any such claim would have to be asserted by the husband or by the lawful representatives of his estate in the event he were deceased. Similarly, I would have no hesitancy in recommending dismissal if the complaint were limited to general charges that the defendants had harassed plaintiff herself.

The fact is, however, that if one looks beyond some of the needless rhetoric in the complaint, one can readily find (albeit poorly expressed) the framework of a valid cause of action. As I understand the complaint, from my reading of it, the plaintiff is claiming that she and her husband, a retired employee of IBM, are the lawful joint owners of a number of shares of IBM stock, the proceeds of which have been wrongfully withheld from the plaintiff by the defendants. She further claims that her husband is deceased, and accordingly plaintiff, as her husband's beneficiary, is entitled to received pension payments from

the defendants under IBM's pension plan, but has been deprived of such payments. Thus, in effect, IBM is being charged both with breach of a contract obligation (under its pension plan) to plaintiff as a third party beneficiary, and also with tortious withholding of stock as to which plaintiff claims a proprietary interest as joint owner with survivorship rights. Quite clearly, such allegations are not demurrable.

Counsel for IBM has advised me, in that connection, that the complaint is correct in its allegations at least to the extent that plaintiff's husband is in fact a retired employee of IBM and that he was at least at one time the holder of IBM stock. IBM's counsel has further represented to me, however, (1) that Mr. Buxton is very much alive and regularly receiving his pension payments, (2) that the plaintiff has heretofore, by appropriate legal documentation, divested herself of whatever interests she may have had in the IBM stock in question, and (3) that the plaintiff is not entitled to any pension benefits so long as her husband, Mr. Buxton, is in fact alive.

Such oral representations, of course, cannot be considered as basis for granting the defendants motions to dismiss, but should rather be brought to this Court's attention by motion for summary judgment following defendants' answer to the complaint. Quite clearly, the validity of much of plaintiff's case depends entirely on whether her allegation to the effect that her husband is dead is objectively true. If it is established that he is in fact alive and if it is further established that the plaintiff has validly divested herself of her IBM stock interests, it would seem to follow that the case would then be dismissed. However, these are issues of fact which cannot under any circumstances be resolved on a motion to dismiss under

Rule 12 F. R. C. P., particularly since there are no affidavits accompanying the motion.

I should mention in passing that it appears from the papers before me that the plaintiff is a resident and citizen of Hawaii and I take judicial notice that IBM is a corporation whose principal place of business is in the State of New York and which is therefore a citizen of the State of New York for jurisdictional purposes. Accordingly, there is no question that this Court has jurisdiction of this action by reason of diversity of citizenship of the parties.

Accordingly, my recommendation is that the defendants' motion to dismiss the complaint under Rule 12(b) (6) for failure to state a claim upon which relief can be granted be denied, without prejudice, however to the right of defendants, if so advised, to move, subsequent to answer, for summary judgment under Rule 56. I would further recommend that the order disposing of this motion direct that an answer be filed within ten days. I believe, in that connection, that an answer which denies each and every allegation in the complaint, except to admit the prior employment by defendants of plaintiff's husband, and which affirmatively alleges that the plaintiff's husband is alive and that the plaintiff has divested herself of her stock interests would be an acceptable answer, in view of the infirmities of the *pro se* complaint.

It is also necessary for me to consider the so-called "cross-motion" or "cross-motions" by the plaintiff for "temporary relief", which I have characterized above as being essentially motions for summary judgment. Since the so-called motions are unaccompanied by affidavits in support thereof the motions cannot properly be considered on their merits.

Report of United States Magistrate

For the reasons stated, it is respectfully recommended that the following "motions" by the plaintiff be denied:

1. "Plea for emergency relief", etc., filed January 17, 1973.

2. Motion for "order for temporary relief" filed January 23, 1973.

3. "Plea for emergency relief" filed March 30, 1973.

I cannot close this report without expressing my regret that I did not succeed in bringing about a direct oral dialogue between the plaintiff and counsel for defendants in connection with my consideration of this motion. Any such dialogue might, in my view, have been helpful both to plaintiff and defendants. I say this because it appears to me that the defendants are caught in a cross fire in connection with a marital dispute between plaintiff and her husband, who plaintiff apparently feels has defaulted in his financial obligations to her—a default for which plaintiff attributes some responsibility to the defendants as her husband's corporate employer. Had the defendants been able, in the course of the hearing before me, to demonstrate to plaintiff's satisfaction that her husband is alive (and perhaps disclose his whereabouts) and also that IBM's obligations under its pension plan have been fulfilled, it might possibly be that the plaintiff might have been persuaded to withdraw this suit. As matters now stand, however, the only feasible resolution of the problems raised by this lawsuit is for me to recommend, as I have, the denial of the defendant's motion, without prejudice to a subsequent motion for summary judgment following the answer to the complaint.

Copies of this report have been mailed this date to the plaintiff and to defendants' counsel with the direction that any objections thereto should be filed in your chambers not later than ten days from the date hereof.

Dated: New York, N. Y.
April 12, 1973.

Respectfully submitted,

HAROLD J. RABY
United States Magistrate

Exhibit A, Appended to Report of United States Magistrate

Marian Virginia Buxton

v.

International Business Machines, et al. 72 Civ. 5228

Pro Se

Marian Virginia Buxton v. IBM, et al.

Pro Se 73 Civ. 4

The above actions were assigned to me on February 5, 1973 pursuant to direction by the Assignment Committee. A review of the pending motions indicates that a great deal of clarification is necessary to understand the relief requested by the plaintiff.

Consequently, the matters are referred to Magistrate Raby who shall notify the parties to appear before him as soon as practicable so that he might hear oral argument and report to this court his recommendations as to the disposition of the pending motions.

So ordered.

Dated: New York, N. Y.
March 6, 1973

CHARLES M. METZNER
U. S. D. J.

EXHIBIT A.

Memorandum and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5228

MARIAN VIRGINIA BUXTON,

Plaintiff,

—v—

INTERNATIONAL BUSINESS MACHINES

and

FRANK T. CARY, President, et al., Officers of IBM,

Defendants.

MEMORANDUM AND ORDER

METZNER, D. J.:

The defendants above named having, by notice of motion filed December 26, 1972, moved, pursuant to Rule 12(b) (6) to dismiss the complaint herein for failure to state a claim upon which relief can be granted, and the plaintiff having filed various cross motions for summary relief under respective dates of January 17, 1973, January 23, 1973 and March 30, 1973, and said motions having been referred to HAROLD J. RABY, United States Magistrate, for hearing and report, and on reading and filing the report of said United States Magistrate dated April 12, 1973, and due deliberation having been had, it is

ORDERED, that the defendants' motion be, and hereby is, denied, without prejudice to said defendants' right to move for summary judgment, or other appropriate relief following answer to the complaint, and it is

FURTHER ORDERED, that the defendants shall serve and file their answer to the complaint herein not later than ten days from the date of entry of this order, and it is

FURTHER ORDERED, that the plaintiff's cross motions filed respectively on January 17, 1973, January 23, 1973 and March 30, 1973, be, and hereby are, denied in all respects.

Dated: New York, N. Y.
April 30, 1973.

CHARLES M. METZNER
Charles M. Metzner
U. S. D. J.